	OAH Docket No. 11-1901-19458-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Steve Sviggum, Commissioner,
Department of Labor and Industry,
State of Minnesota,
Complainant,

v.

Bailey Nursery, Inc.,
Respondent.

ORDER ON CROSS-MOTIONS FOR SUMMARY DISPOSITION

This matter is pending before Administrative Law Judge Barbara L. Neilson pursuant to a Notice of and Order for Hearing issued by the Commissioner of the Department of Labor and Industry on January 28, 2008, and the parties' cross motions for summary disposition. Rory H. Foley, Assistant Attorney General, appeared on behalf of the Department of Labor and Industry. Gregory L. Peters, Attorney at Law, Seaton, Beck & Peters, appeared for Respondent, Bailey Nursery, Inc.

ORDER

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum:

IT IS ORDERED as follows:

1. Complainant's Motion for Summary Disposition is **DENIED.**

2. Respondent's Motion for Summary Disposition is **DENIED**.

3. This matter shall proceed to hearing on a date to be determined. To facilitate the scheduling of hearing dates, the parties shall provide the Administrative Law Judge by October 22, 2008, with an estimate of the number of days needed for hearing and a list of dates in November 2008 through January 2009 on which they and their witnesses and counsel would be available. The Administrative Law Judge will thereafter set hearing dates for this matter.

Dated: October 8, 2008

s/Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

Factual Background

Employers in Minnesota are required to comply with the occupational safety and health standards and rules promulgated under the Minnesota Occupational Safety and Health Act (MN OSHA).[1] The Act defines "employer" as "a person who employs one or more employees [including] any person who has the power to hire, fire, transfer, or who acts in the interest of, or a representative of, an employer . . . ."[2] "Employee" is defined as "any person suffered or permitted to work by an employer, including any person acting directly or indirectly in the interest of or as a representative of, an employer . . . ."[3] It is evident that Bailey is an employer subject to the Act since, by its own admission, it employs approximately 1,000 employees.[4] It is undisputed that the individuals observed by the OSHA inspector in this case were employees within the meaning of the Act.

Pursuant to Minn. R. 5205.0010, subd. 2, the Minnesota Department of Labor and Industry adopted by reference Part 1910 of Volume 29 of the U.S. Code of Federal Regulations. Part 1910 contains the general industry standards.

Based upon the submissions of the parties, it is assumed for the purposes of consideration of these motions that the facts in this case are as follows. Bailey Nurseries, Inc. ("Bailey"), is a Minnesota company that has been in business since 1905, with its principal place of business in Newport, Minnesota. Bailey is a fourth-generation, family-owned wholesale nursery which distributes to more than 4,500 retailers. Every spring, Bailey plants more than 2.7 million fruit and shade trees. Each fall, Bailey harvests its trees and stores more than 7.5 million cubic feet of plants and trees in its warehouse for the winter.[5]

During the winter months, Bailey prepares its stored plants for the coming spring season. This preparation includes pulling trees for inspection, grading, bundling and storage for distribution in the spring. Bailey stores its trees in its cold storage warehouse in structures described as "bins." Each bin is approximately four (4) feet high. The bins are organized in rows and stacked four (4) bins high. The total height of each stack of bins is about sixteen (16) feet. The bins have an open top and sides to expose the stored trees to the open air. Prior to being stacked in bins, trees are unloaded on the floor in piles of up to approximately eight feet high. The piles are at least fifteen feet wide and deep. During the winter months, certain Bailey employees walk and work on the top of the trees.[6]

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[1] Minn. Stat. § 182.653, subd. 3.
[2] Minn. Stat. § 182.651, subd. 7.
[3] Minn. Stat. § 182.651, subd. 9.
[4] Affidavit of Joseph Bailey, ¶3.
[5] Bailey Affidavit, ¶¶ 2-6.
[6] Affidavit of Michael Marsh, ¶¶ 2-3; Bailey Affidavit, ¶¶ 7-9.

On December 4-5, 2006, the Minnesota Occupational Safety and Health Division of the Department of Labor and Industry ("the Department") conducted an inspection of Bailey's main facility located in Newport, Minnesota, and its Nord Farm facility located in Cottage Grove, Minnesota. The inspection was conducted by Occupational Safety and Health Investigator Kevin Gilbert. In the course of inspecting the Newport facility, Investigator Gilbert observed and photographed Bailey's cold storage facility, which is used for the storage of plants and trees for later sale. He observed one of Bailey's employees working on top of stacks of trees at heights in excess of 16-20 feet, without wearing proper fall protection equipment, and saw two other employees working in close proximity. A structure that looked like a scaffold, rising four to five sections high, was used in the warehouse, and at least one of the employees that Investigator Gilbert observed was atop trees at the fifth scaffold level. Mr. Gilbert subsequently measured the scaffolding sections and determined that each section was four feet in height. He interviewed employees and prepared an inspection report.[7]

Based upon this inspection, Inspector Gilbert recommended that the Department issue a citation to Bailey Nurseries for a violation of 29 C.F.R. 1910.132(a) (2006) based on his determination that Bailey's employees were not using adequate fall protection equipment when working on the stacks of trees in the cold storage facility. Inspector Gilbert assigned a severity rating of E on a scale of A (least severe) to F (most severe), and a probability rating of 4 on a scale of 1 (least probable) to 10 (most probable). He also determined that the citation should be classified as a serious violation.[8]

After determining the severity and probability factors, Inspector Gilbert determined an unadjusted penalty amount. Based on the gravity-based penalty table in the Department's Field Compliance Manual, he concluded that a severity level of E and a probability rating of 4 resulted in an unadjusted penalty of $2,500. Employers may receive a credit against the unadjusted penalty for good faith, size and history with MN OSHA.[9] Inspector Gilbert applied a 60% credit for Bailey Nurseries' good faith, history and size. This credit reduced the penalty for Citation 1, Item 2 from $2,500 to $1,500.[10]

In accordance with the recommendation of Inspector Gilbert, the Department issued a citation to Bailey on December 26, 2006, for the fall hazard and assessed a $1,500.00 penalty. Bailey was given until January 19, 2007, to abate the violation.[11] Bailey filed a timely Notice of Contest challenging the citation, type of violation, abatement date, and penalty amount.[12]

The Department served Bailey with a Summons and Complaint relating to the citation at issue in this case on April 16, 2007. Bailey served an Answer to the

[7] Affidavit of Kevin Gilbert, ¶¶ 1-7.
[8] Dept. Exhibit 1 at 5; Gilbert Affidavit, ¶¶ 8-12.
[9] Minn. Stat. § 182.666, subd. 6.
[10] Gilbert Affidavit, ¶12.
[11] The citation also alleged other violations that are not at issue in this proceeding. See Dept. Exhibit 1.
[12] Dept. Exhibit 2; *see also* Letter from R. Foley to Administrative Law Judge dated June 18, 2008.

Complaint on May 2, 2007, in which it denied the allegations regarding the relevant citation and asserted as an affirmative defense that the complaint failed to state a claim upon which relief may be granted.[13] This contested case proceeding was initiated on January 29, 2008. The parties subsequently filed cross motions for summary disposition, and presented written and oral argument on the motions.

Legal Standard for Summary Disposition

Summary disposition is the administrative equivalent to summary judgment.[14] Summary judgment is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law.[15] A genuine issue is one that is not a sham or frivolous, and a material fact is one which will affect the outcome of the case.[16] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.[17]

The moving party must demonstrate that no genuine issues of material fact exist.[18] If the moving party is successful, the nonmoving party then has the burden of proof to show specific facts are in dispute that can affect the outcome of the case.[19] It is not sufficient for the nonmoving party to rest on mere averments or denials; it must present specific facts demonstrating a genuine issue for trial.[20] When considering a motion for summary judgment, the Judge must view the facts in the light most favorable to the non-moving party.[21] All doubts and factual inferences must be resolved against the moving party.[22] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[23]

Arguments of the Parties

The dispute in this case focuses on whether the Department may appropriately seek to apply to Bailey the general OSHA standard relating to personal protective equipment set forth in 29 C.F.R. § 1910.132(a). That standard requires that:

> [P]rotective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in

[13] The Summons, Complaint, and Answer are attached to the Notice and Order for Prehearing Conference that was filed in this matter.
[14] Minn. R. 5500 (K) (2002).
[15] Minn. R. Civ. P. 56.03 and Minn. R. 5500 (K) (2002).
[16] *Highland Chateau v. Minnesota Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984), *rev. denied* (Minn. February 6, 1985).
[17] Minn. R. 1400.6600.
[18] *Theile v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).
[19] *Highland Chateau*, 356 N.W.2d at 808.
[20] Minn. R. Civ. P. 56.05.
[21] *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).
[22] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[23] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

> a sanitary and reliable condition wherever it is necessary by reasons of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

The Department maintains that Bailey's employees were exposed to a fall hazard when working on piles of trees, and emphasizes that the inspector observed at least one employee working at a height of 16-20 feet above the ground without wearing any fall protection. It argues that the general personal protective equipment standard set forth in 29 C.F.R. § 1910.132(a) applies to the fall hazards present here, and asserts that Bailey violated that standard by failing to provide personal protective equipment to its workers to prevent their exposure to the risk of injury through falls. The Department further contends that the citation was properly classified as serious, and the penalty and abatement period were reasonable and appropriate.

Bailey asserts that the general personal protective equipment requirement does not extend to fall protection and, as a result, the citation was improper and should be dismissed. It points out that fall protection is not explicitly mentioned in 29 C.F.R. § 1910.132(a). It argues that the meaning of the standard is not clear and the rule should not be interpreted to encompass fall protection. Bailey also contends that it would not be proper to grant summary disposition to the Department because material facts are at issue regarding whether Bailey violated the cited standard and whether the penalty and abatement dates were reasonable or appropriate.

Bailey filed Affidavits of Michael Marsh (Bailey's Safety Director) and Joseph Bailey (Bailey's Director of Human Resources) in connection with the motion. Mr. Bailey indicates in his affidavit that, during the winter months, certain Bailey employees walk and work on the top of the trees "at least on a regular basis as part of their normal job duties."[24] Mr. Marsh contends that, while the trees are in bins, there is fall protection on three sides because two sides of the bins are enclosed and there "generally" is a wall on the back side of each set of bins. He also asserts that employees are trained to work away from the front of the bins, thereby eliminating fall hazards.[25] Before the trees are stacked in bins, Mr. Marsh contends that the trees are stacked very closely together in piles on the floor and employees are trained to work in the middle of the piles when they are on top of a pile of trees. He asserts that an employee falling off of one side of a pile would land on another pile of trees. Mr. Marsh compares the piled trees to a stack of hay and indicates that the product "is quite forgiving and easy to walk on." He noted that he was unaware of any employee falling off or injuring themselves while working on the tree piles or in the bins during the ten years he has worked at Bailey.[26]

Bailey further argues that a more specific OSHA standard applicable to elevated platforms (29 C.F.R. § 1910.23(c)(1)) applies in this instance and that it thus was

[24] Bailey Affidavit, ¶ 9.
[25] Marsh Affidavit, ¶2.
[26] Marsh Affidavit, ¶¶ 3-4.

improper for the Department to allege a violation of the general personal protective equipment standard. The more specific standard states:

> (c) Protection of open-sided floors, platforms, and runways.
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> (1) Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides,
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> (i) Persons can pass,
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> (ii) There is moving machinery, or
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> (iii) There is equipment with which falling materials could create a hazard.[27]

Bailey also points out that the Department's own rules applicable to non-construction situations note that no employee shall be allowed to work "on an elevated platform or rack intended primarily for the storage of materials unless the storage area has been provided with the safeguards" set forth in section 1910.23(c)(1).[28] Bailey asserts that the work area at issue constitutes an elevated platform intended primarily for the storage of materials and asserts that "employees walk and work on the trees on a predictable and regular basis."[29] It argues that section 1910.23(c)(1) takes precedence over section 1910.132(a) because it is the more specific standard.[30] It further contends that, because the Department cited an incorrect rule standard and did not cite the more specific standard in the alternative in accordance with federal OSHA policy, it is entitled to summary disposition in this matter.[31]

The Department asserts in response that, even though personal fall protection is not specifically mentioned in section 1910.132(a), the courts and the Occupational Safety and Health Review Commission have consistently interpreted and applied the standard to require that personal fall protection equipment be provided to an employee whenever it is necessary due to the presence of a hazard. The Department argues that the fall hazard in this case was obvious. With respect to Bailey's argument that the wrong standard was cited, the Department maintains that a pile of living trees does not constitute a "platform" within the meaning of section 1910.23(c)(1). It contends that nothing in the OSHA rules suggests that a stack of merchandise primarily meant for

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[27] 29 C.F.R. § 1910.23(c)(1).

[28] Minn. Rule 5205.0040 (2007).

[29] Bailey Memorandum in Support of Motion at 5; see also Bailey Affidavit, ¶9 ("During the winter months, certain Bailey employees walk and work on the top of the trees at least on a regular basis as part of their normal job duties").

[30] Bailey Memorandum in Support at 5, *citing Well Tech Inc.*, 1985 WL 44711 (O.S.H.R.C.A.L.J.) (attached to Bailey's Memorandum in Support of Motion as Exhibit D); *see also* 29 C.F.R. § 1910.5(c)(1) ("If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process").

[31] Bailey Memorandum in Support at 5, *citing* OSHA Instruction STD 1-1.13 (April 16, 1984).

sale constitutes a platform, or that any and all elevated surfaces used by employees amount to platforms. Moreover, the Department argues that, in any case, it would not be possible for Bailey to comply with the railing and toe-board requirements of section 1910.23(c). Finally, the Department maintains that Bailey should not be permitted to claim that an improper standard was cited at this stage of the proceeding, since it did not raise this claim in its Notice of Contest or its Answer.[32]

Analysis

The Administrative Law Judge first addresses Bailey's argument that it is entitled to summary disposition on the grounds that section 1910.23(c)(1) applies under the circumstances presented here. The term "platform" is defined in OSHA regulations as "[a] working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment."[33] The U.S. Department of Labor issued a directive in 1984 that was intended to "clarif[y] the applicability of 29 CFR 1910.23(c)(1), (c)(3) and 1910.132(a) where employees are exposed to falling hazards while performing various tasks including maintenance from elevated surfaces." The issuance of the directive was prompted by inconsistent adjudicated decisions regarding employee exposures to falls from elevated surfaces and the urging of the U.S. Court of Appeals for the Second Circuit that OSHA clarify its intended meaning of the term "platform."[34]

In the 1984 directive, OSHA cross-referenced the definition of "platform" set forth in the OSHA rules and further stated that "platforms are interpreted to be any elevated surface designed or used primarily as a walking or working surface, and any other elevated surfaces upon which employees are required or allowed to walk or work while performing assigned tasks on a predictable and regular basis." The phrase "predictable and regular basis" was further defined to mean "employee functions such as, but not limited to, inspections, service, repair and maintenance" which are performed "[a]t least once every 2 weeks" or "[f]or a total of 4 man-hours or more during any sequential 4-week period (e.g., 2 employees once every 4 weeks for 2 hours = 4 man-hours per 4-week period." The directive stated that employee exposures to falls from platforms are regulated by 29 CFR 1910.23(c)(1) or (3). The directive further noted that, in situations where the safeguarding requirements of those standards "are not applicable because employees are exposed to falls from an elevated surface other than a [sic] predictable and regular basis, personal protective equipment as required by 29 CFR 1910.132(a) or other effective fall protection shall be provided."[35]

The decisions construing federal OSHA requirements make it clear that not all elevated surfaces upon which employees walk or stand constitute platforms within the meaning of the rule. For example, the Commission determined in a 1993 decision that

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[32] Department's Response Memorandum in Opposition to Bailey's Motion at 4-9.
[33] 29 C.F.R. § 1910.21(a)(4).
[34] OSHA Instruction STD 1-1.13 (April 16, 1984) (attached to Department's Response Memorandum as Ex. 4).
[35] *Id*.

unguarded copper anode rails, PVC air pipes, and carry arms were not platforms because "they were neither built nor rigged to serve that purpose," even though employees frequently stood on them while retrieving parts that had fallen into tanks.[36] Moreover, an Administrative Law Judge for the Commission held in a 2002 case that the roof of a mobile home in mid-assembly did not constitute a platform within the meaning of section 1910.23(c)(1) because it was only a temporary surface and "the standard applies to permanent platforms." The Judge also emphasized that the mobile homes were products manufactured by the company, and noted that the Review Commission had previously found that "the surface of a product while it is being manufactured, assembled, and tested is not a platform . . . ."[37]

In the present case, the "surface" on which Bailey employees are working is comprised of stacks of trees piled on the ground or stacks of trees stored parallel to the ground in a bin. There is no evidence that the trees were designed or intended to be used as a platform. The surface created by the stacked trees is temporary and transient, and not permanent in nature. Moreover, the trees do not form a flat horizontal work surface that can logically be viewed as a platform.[38] Bailey has not pointed to any OSHA decisions applying section 1910.23(c)(1) to anything similar to these stacks of trees, and the Administrative Law Judge has been unable to find any such rulings. Furthermore, it would not be feasible for Bailey to comply with the requirements of section 1910.23(c)(1) because that standard would require that Bailey continually attach a standard railing and toe-board to the trees on the top of the stack, further supporting the view that this standard is not applicable to the type of surface formed by stacked trees. Finally, Bailey has not provided a factual basis to support the determination that its employees perform any of the work functions identified in the directive on the tree stacks at least once every 2 weeks or for a total of 4 man-hours or more during any sequential 4-week period. Accordingly, because there has not been a sufficient showing by Bailey to demonstrate that the trees constitute a "platform" within the meaning of Minn. Rule 5205.0040, 29 C.F.R. § 1910.23(c)(1), the 1984 OSHA directive, or applicable case law, Bailey's motion for summary disposition concerning the applicability of section 1910.23(c)(1) must be denied.

Turning to the Department's motion, the Administrative Law Judge concludes as a threshold matter that the standard cited by the Department (section 1910.132(a)) may properly be applied to fall hazards. In demonstrating a violation of an OSHA standard, the Commissioner must, among other things, prove by a preponderance of the evidence that the cited standard applies. If the meaning of the standard is not clear, the language

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[36] *Secretary of Labor v. Unarco Commercial Prods.,* 1993 WL 522454 at *2 (O.S.H.R.C. 1993) (attached to Department's Response Memorandum as Exhibit 10).

[37] *Secretary of Labor v. Spirit Homes, Inc.,* 2002 WL 31163770 at *22-*23 (O.S.H.R.C.A.L.J.), *citing Allis-Chalmers Corp.,* 4 O.S.H.C. (BNA) 1227, 1228 (O.S.H.R.C. 1978).

[38] The understanding that a platform will have a flat horizontal surface is in keeping with the plain meaning of the term. For example, the term "platform" is defined in the Merriam-Webster On-Line Dictionary as "a usually raised horizontal flat surface; *especially***:** a raised flooring." (www.merriam-webster.com/dictionary/platform.)

of the standard, its legislative history, and (if the drafter's intent remains unclear) the reasonableness of the agency's interpretation should be considered.[39]

It is true, as pointed out by Bailey, that 29 C.F.R. § 1910.132(a) does not contain an explicit reference to the need to supply equipment protecting employees from falls. However, the Administrative Law Judge does not agree that an interpretation of section 1910.132(a) to require the provision of fall protection is "tortured" or "illogical." The standard does not attempt to identify the particular equipment that must be provided. It is evident that the standard is general in nature, and is designed to protect the health and safety of employees through the use of protective equipment "wherever it is necessary by reason of hazards."

Even if the language of the standard is deemed to be ambiguous with respect to its application to fall hazards, it is well established in cases arising under the federal Occupational Safety and Health Act that 29 C.F.R. § 1910.132(a) may be applied to such hazards. The courts and the federal Occupational Safety and Health Review Commission have consistently found that employees must be provided with personal fall protection under section 1910.132(a) wherever it is necessary by reason of hazards.[40] For example, the U.S. Court of Appeals for the Fifth Circuit noted in 1980 that both section 1910.132(a) and section 1926.28(a) (its analog in the construction industry) "require the use of personal protective equipment, such as safety belts, when necessary to protect against hazards such as falling."[41] The federal Occupational Safety and Health Review Commission reaffirmed in its 1994 decision in *Secretary of Labor v. Hackney*[42] that section 1910.132(a) may be applied to fall hazards and may require the use of safety belts:

> The examples of personal protective equipment listed in the standard are merely illustrations, not an exhaustive list. Standards and regulations under the Act are to be broadly and reasonably construed to effectuate the Act's express purpose, which is 'to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." [Citations omitted.] The purpose of section 1910.132(a) is to promote the safety and health of employees through the use of necessary protective equipment, including

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[39] *See, e.g., Secretary of Labor v. Manganas Painting Co.*, 2007 WL 2285345 (O.S.H.R.C.) (attached as Ex. 3 to Department's Memorandum in Support of Motion for Summary Disposition); *Secretary of Labor v. Well Tech Inc.*, 1985 WL 44711 at *4 (O.S.H.R.C.A.L.J.) (attached as Exhibit 9 to Department's Response Memorandum).

[40] *See, e.g., Well Tech* at *5; *Manganas Painting* at *21; *Secretary of Labor v. CMH Material Handling, LLC,* 1998 WL 472014 (O.S.H.R.C.A.L.J. 1998) (attached as Exhibit 8 to Department's Response Memorandum); *Secretary of Labor v. Hackney Inc.,* 1994 WL 250137, 16 O.S.H.C. (BNA) 1806, 1807-09 (O.S.H.R.C. 1994) (attached as Exhibit 4 to Department's Response Memorandum and as Exhibit J to Bailey's Memorandum in Support of Motion); *Secretary of Labor v. Cleveland Elec. Illuminating Co.,* 1994 WL 611413 at *4, 16 O.S.H.C. (BNA) 2091, 2094 (1994) (attached to Department's Response Memorandum as Exhibit 6).

[41] *Turner Communications Corp. v. Occupational Safety and Health Review Comm'n,* 612 F.2d 941, 944 (5th Cir. 1980) (attached to Department's Response Memorandum as Exhibit 5).

[42] *Secretary of Labor v. Hackney, Inc.,* 1994 WL 250137, 16 O.S.H.C. (BNA) 1806 (O.S.H.R.C.).

> personal protective equipment not specifically mentioned. Although the standard is ambiguous as to whether fall hazards are covered, we see nothing in it or its subpart that suggests that those are not hazards of 'processes or environment' under the standard. The term "environment" need not be read to cover only hazards such as climatic or air-borne hazards. "Environment" is synonymous with "surroundings," and has been defined as "the surrounding conditions, influences, or forces that influence or modify[.]" Webster's Third New Int'l Dictionary 760 (1986 ed.). The work environment often includes elevated areas from which an employee could fall and be injured by "physical contact."[43]

The Commission observed that, where the regulatory language is found to be ambiguous, "the Secretary's interpretation of his standards should be given effect, so long as that interpretation is reasonable," and then found that the Secretary's interpretation that the standard may be applied to fall hazards was "reasonable and consistent with the language and purposes of the standard."[44] In keeping with the federal case law, an Administrative Law Judge in Minnesota has determined that a hazard presenting a significant risk of harm existed within the meaning of section 1910.132(a) where employees in a beef processing plant working from elevated work platforms ranging from 5 feet to 8 ½ feet from the ground were not provided with personal fall protection.[45]

The Administrative Law Judge thus concludes in the present case that it is reasonable and consistent with the language and purposes of the standard for federal and state OSHA enforcement officials to interpret section 1910.132(a) to require personal fall protection equipment under appropriate circumstances. However, despite the fact that there is authority for applying the general personal protective equipment standard to fall hazards, the Administrative Law Judge finds that the Department has not demonstrated that it is entitled to summary disposition in this case. In order to prove a violation of a general standard such as 29 C.F.R. § 1910.132(a), the Commissioner's burden is to show that a hazard existed which presented a significant risk of harm to employees; personal protective equipment that would eliminate the hazard was available and feasible; and the employer had actual or constructive notice that the general standard required the use of personal protective equipment for the work at

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[43] *Id*. at *2.
[44] *Id*.
[45] Findings of Fact, Conclusions of Law, and Order issued in *Comm'r of Dep't of Labor and Indus. v. IBP, Inc.*, OAH Docket No. 1-1901-11222-2 (1998), citing *S & H Riggers & Erectors, Inc.,* 7 O.S.H.C. (BNA) 1260, 1266, 1979 O.S.H.D. (CCH) ¶ 23,480 (1979), and *ConAgra Flour Milling Co.,* 16 O.S.H.C. (BNA) 1137, 1993 O.S.H.D. (CCH) ¶ 30,045 (Rev. Comm. 1993). Because the ALJ in the *IBP* case found that the Department had failed to prove that the employer had actual or constructive notice that it was required to use personal protective equipment on the work platform in question, he ordered that the citation be vacated and the penalty dismissed.

issue.[46] A factor in determining the existence of constructive notice is whether or not the employer complies with industry practice.[47]

Bailey's Safety and Human Resources Directors provided affidavits asserting that any potential fall risk was eliminated by virtue of the nature of the work and material involved, the presence of fall protection on some sides of the bins, and employee training. In addition, the parties provided only vague descriptions of the work being performed by the Bailey employees, and the pictures taken by the Department's inspector were very unclear and difficult to decipher. Under these circumstances, the Administrative Law Judge concludes that genuine issues of material fact remain for hearing concerning whether fall hazards that presented a significant risk of harm existed. Moreover, the Department did not make any showing in connection with its motion that personal protective equipment is available and feasible or that Bailey had actual or constructive notice that personal protective equipment was required in connection with the work at issue, and thus failed to provide a basis for concluding that it had satisfied the last two elements of its burden of proof. Bailey asserted in its Reply Memorandum and during motion argument that the Department in fact failed to provide notice to employers of its interpretation of section 1910.132(a) to include fall protection equipment.

Accordingly, the Administrative Law Judge concludes that genuine issues of material fact remain for hearing regarding whether these employees were, in fact, exposed to fall hazards; whether protective equipment was available and feasible; and whether Bailey had actual or constructive notice that personal protective equipment was required. The Department's motion for summary disposition must be denied, and this matter must proceed to hearing.

B. L. N.

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[46] *Comm'r v. IBP* at 6, 7, 9 (*citing ConAgra Flour Milling Co.* at 1140-42). In the *IBP* case, the ALJ (relying on *Miami Industries, Inc.,* 1991 O.S.H.D. (CCH) ¶ 29,465 (O.S.H.R.C. 1991), *aff'd,* 15 O.S.H.C. (BNA) 2025, 1992 O.S.H.D. (CCH) ¶ 29,922 (6th Cir. 1992)) noted that, as a general rule, an employer cannot be held in violation of the Act if it fails to receive prior fair notice of the conduct required of it, and an appropriate remedy for a lack of notice on the part of the employer is to vacate the citation rather than to reclassify it and require abatement of the hazard.

[47] *Comm'r v. IBP* at 12 (citing *Armour Food Co.,* 14 O.S.H.C. (BNA) 1817, 1820, 1987-90 O.S.H.D. (CCH) ¶ 29,088 (O.S.H.R.C. 1990).